

CONTRACT EXEMPTION NO. 2009-03

Issued On July 9, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Raleigh County Solid Waste Authority** asks for an exemption to permit it to continue to purchase equipment and services from Beckley Feed and Hardware, a local store owned by Raleigh County Solid Waste Authority board member Austin Caperton.

FACTS RELIED UPON BY THE COMMISSION

Over the past several years, the Raleigh County Solid Waste Authority ("Authority") has purchased Stihl equipment for use at the landfill and the 600 acres of land owned by the Authority. As a result, the majority of the outdoor handheld equipment utilized by the Authority, including trimmers, weed eaters, and other handheld tools, are Stihl products. The Authority has purchased its Stihl equipment at the Beckley Feed and Hardware store, located approximately eight miles from the Authority's landfill.

Current Authority board member Austin Caperton is the owner of Beckley Feed and Hardware store. In addition to selling and servicing Stihl products, the Beckley Feed and Hardware store also serves as a full service dealer of EZ-GO golf carts and utility vehicles, as well as Cub Cadet lawn tractors and commercial mowers.

Beckley Feed and Hardware is the only local dealer and service center for Stihl equipment in the area. Nationally, Stihl only allows the sale and servicing of its products at licensed dealerships. Aside from the Beckley Feed and Hardware, the only other Stihl dealerships in the region are located in Princeton, Pineville, Whitesville, and Rainelle. The approximate round trip travel time to the closest store outside Raleigh County would be one and half hours.

According to the Requester, it would be a hardship upon the Authority to have employees travel outside the county in order to have existing Stihl equipment serviced or to purchase new equipment. The Requester states that requiring its employees to travel one and a half hours results in lost work-hours for maintenance projects.

Further, the Requester seeks an exemption to allow Beckley Feed and Hardware to participate in future bid proposals for other equipment purchased through a bidding process. According to the Requester, the Authority requires a bidding process for the purchase of items in excess of \$10,000. For items priced between \$5,000 and \$10,000, the Authority requires quotes from at least three separate sources. Finally, no bidding process or quotes are required for the purchase of items less than \$5,000.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control.

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, ...or other governmental agency, the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part that ... It shall be unlawful for ... any member of any other county or district board... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member ... he may have any voice, influence, or control.

W. Va. Code § 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

The Ethics Act and West Virginia Code § 61-10-15

The Ethics Act prohibits public servants, including appointed county board members, from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control, unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A). However, the \$1,000 exception is inapplicable in the present situation due to the harsher restrictions imposed by W.Va. Code § 61-10-15.

In addition to the Ethics Act, an appointed board member of the county solid waste authority must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition under W.Va. Code § 61-10-15 does not have a \$1,000.00 threshold.

In this matter, a county solid waste authority seeks to purchase items and equipment from a current member of its governing board. Because the purchases will be from a county official's store, the contract and purchase of such items is prohibited, unless an exemption is obtained. Further, the Requester has inquired about future bidding opportunities and purchases.

Therefore, because an exemption is necessary under both the Ethics Act and W.Va. Code § 61-10-15, the analysis will be combined and shall be deemed applicable to both statutory prohibitions.

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. Similarly, under W.Va. Code § 6B-2-5(d) of the Ethics Act, the Commission may grant an exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of the affected government body.

In the present case, the Requester maintains that requiring it to travel outside the County to purchase new equipment or to have its equipment serviced would constitute an undue hardship, excessive cost and a substantial interference with its operations. In particular, the Requester asserts that the Beckley Feed and Hardware store is the only licensed Stihl dealer in the area, and thus the only store in which to obtain replacement parts and accessories.

Several years ago, the Commission addressed a similar issue relating to the purchase and servicing of Stihl equipment. In Contract Exemption 2007-04, the Commission denied an exemption to the City of Ripley for the purchase of new equipment, but allowed a limited exemption for servicing of the equipment and incidental purchases. Specifically, the Commission held:

Based upon the foregoing, the Ethics Commission grants the City of Ripley an exemption for incidental purchases from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to purchase parts and accessories, and to obtain services from Moore's that are otherwise not available in Jackson County. The exemption is granted with one limitation: should the City determine it needs to purchase a new tool or other piece of equipment (other than a Stihl part or accessory for an existing tool) that exceeds the cost of \$100.00 (one hundred dollars), it may not make any such purchase from Moore's.

Similarly, in Contract Exemption 2008-14, the Commission denied an exemption to the City of Weirton for the purchase of goods owned by a City Council member, except on an emergency basis or if the item was not otherwise available in the Weirton area. In making this ruling, the Commission stated:

The Commission cannot, however, authorize future purchases of road signs, lawn mowers, or other items that are available on the open market, especially since these purchases were anticipated, not emergencies.

Although the issues presented in C.E. 2007-04 and C.E. 2008-14 only involved the prohibitions of the Ethics Act, the Commission finds the same reasoning would be equally applicable to the prohibitions under W.Va. Code § 61-10-15.

Purchase of New Equipment

In the present matter, the Commission finds that the Requester has failed to demonstrate the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption for the purchase of **new** equipment and supplies from Beckley Feed and Hardware. While the Commission is appreciative that the Authority may be inconvenienced, the Commission finds that the Authority will not

be unduly burdened by either purchasing new Stihl equipment and tools from other Stihl dealerships or sources, or by purchasing another brand of equipment from another source. The Requester has not presented evidence that the Authority purchases new Stihl equipment with such frequency that requiring it to purchase new equipment at another store and/or having it shipped from another location would be cost-prohibitive or significantly interfere with the operations of the landfill. Further, the Requester has failed to demonstrate that Stihl is the only brand that the Authority can use in its operations.

Additionally, the Commission finds that multiple hardware stores and supply shops operate in close proximity to the Authority, and the Authority will not be unduly burdened or have its operations substantially interfered with by purchasing non-Stihl tools and items at locations other than Beckley Feed and Hardware.

Therefore, the Commission hereby denies an exemption from the provision of W.Va. Code § 61-10-15 and W. Va. Code § 6B-2-5(d).

Service of Existing Stihl Products

While the Authority will be prohibited from purchasing new equipment at the Beckley Feed and Hardware, the Commission does grant a limited exemption for the servicing of existing Stihl equipment owned by the Authority as well as for the purchase of Stihl accessories and replacement parts for existing Stihl equipment products. In granting this limited exemption, the Commission notes that the Authority would experience undue hardship and substantial interference with its operations if it had to travel to another dealership outside the county to have equipment serviced, or to obtain a replacement part.

The Commission also notes that the Authority would incur excessive cost if it had to replace every Stihl product it owns. Instead, utilizing and servicing existing equipment curtails the necessity of future purchases or greater expense of public funds.

Therefore, the Commission grants the Raleigh County Solid Waste Authority an exemption from the prohibitions of W.Va. Code § 6B-2-5(d) and W.Va. Code § 61-10-15, to allow it to purchase Stihl parts and accessories (for currently owned Stihl products) and to obtain service and repair of existing Stihl equipment from Beckley Feed and Hardware, that are otherwise not available in Raleigh County.

Future Bidding Opportunities

Finally, the Requester seeks an exemption to allow the Beckley Feed and Hardware store to participate in future bidding opportunities with the Authority. While the Requester does not specify a particular bidding opportunity, the Authority's general threshold for bidding items is \$10,000.

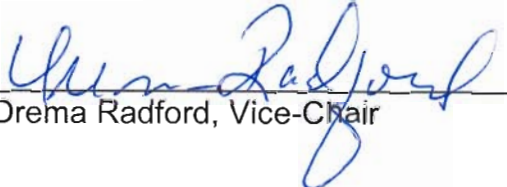
Due to the abstract, hypothetical nature of the request and the absence of an actual proposed transaction, the Commission is unable to render a decision on the exemption request.

Instead, the Commission would caution that should Beckley Feed and Hardware participate in a bidding opportunity with the Authority, the Authority would still need to obtain an exemption from the Commission **before** it approved a low bid from Beckley Feed and Hardware. Further, should Beckley Feed and Hardware desire to pursue a bidding opportunity with the Authority, its owner should not have any involvement in setting the requirements of the bid or in evaluating or approving the bids in any respect. He should also recuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his interests, and recusing himself from voting on the issue. W.Va. Code § 6B-2-5(j)(3).

Conclusion

Based on the foregoing, the Commission denies an exemption for the purchase of future equipment, products or items by the Raleigh County Solid Waste Authority from Beckley Feed and Hardware. However, the Commission does grant a limited exemption for the purchase of incidental Stihl parts and accessories (for currently owned Stihl products) and for the servicing and repair of existing Stihl equipment from Beckley Feed and Hardware, that are otherwise not available in Raleigh County.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons.


Drema Radford, Vice-Chair